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No. 03-870

Supreme Court, U.S.
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In The

# Supreme Court of the United States

SUSAN VICORY, et al.,

*Petitioners,*

v.

VERMILLION COUNTY, INDIANA and BOARD OF COMMISSIONERS OF VERMILLION COUNTY, INDIANA,

*Respondents.*

**On Petition For Writ Of Certiorari To The Court Of Appeals Of Indiana, First District**

## RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## OPINION BELOW

On June 3, 2003, the Memorandum Decision-not for publication of the Indiana Court of Appeals affirmed in part, reversed in part, and remanded for entry of summary judgment in favor of the County Defendants, by Judge Baker with Sullivan J. and Darwin J., concurring; it is reproduced in the Appendix of the Petitioner. Pt. App. 1a-25a. On September 26, 2003, the Indiana Supreme Court, the state court of last resort, denied discretionary review. Its order is reproduced in the Appendix of the Petitioner. Pet. App. 39a-40a.

## JURISDICTION

The Indiana Court of Appeals entered its Memorandum Decision on June 3, 2003.

Plaintiff/Appellee's Petition for Transfer was denied by the Indiana Supreme Court on September 26, 2003. This court has jurisdiction under 28 U.S.C. § 1257(a).

## STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitutions and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper

> proceedings for redress, except that any action brought against a judicial officer upon act or omission taken in such officer's judicial capacity injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

### A. Statement of Facts

Petitioners are the personal representative or next of kin of persons who allegedly died while patients of the Vermillion County Hospital, Vermillion County Indiana. (Complaint ¶1, Appellants' Appendix pp. 341-343.) Respondents are the Board of Commissioners of Vermillion County, the county where the hospital is located. Plaintiffs claim that a nurse at the hospital murdered the decedents while the latter were patients. (Complaint ¶2, Appellants' Appendix, p. 343.)

The hospital was created pursuant to the Act of 1917. Pursuant to the statute, its management and operation is controlled by the Board of Trustees of Vermillion County Hospital, which is the "supreme authority" for the hospital. (Affidavit of Phyllis Orman, Exhibit "A", Appellants' Appendix, pp. 226-277.) During the relevant time period, Dr. John Albrecht was on the staff of the hospital and was in charge of the intensive care unit. (Plaintiffs' Complaint, ¶2, Appellants' Appendix, p. 343.) During that relevant time period, Dr. Albrecht also held the position of County Health Officer for Vermillion County, Indiana. (Plaintiffs'

Complaint ¶2, Appellants' Appendix, p. 343.) The responsibilities and duties of a County Health Officer are delineated by Indiana statute, I.C. 16-20-1 et seq.

Pursuant to Supreme Court Rule 15, the Respondent would point out to this Court that the Petitioners on page 3 of their Statement of the Case, state "there is no comparable occurrence of epidemic hospital death in American history." The Petitioners cite to footnote 1 referencing a *Washington Times* article of December 7, 1998. This material was neither designated nor submitted to either the trial court or the Court of Appeals below, and thus is an inappropriate and improper reference in their Petition.

Further, pursuant to Supreme Court Rule 15, the Respondent would point out that the Petitioners continually attempt to characterize the duties of the County Health Officer as including the duty or responsibility to review death charts and records in their drumbeat repetition of the statutory duties of the County Health Officer in footnote 4, footnote 5 and on pages 3 and 12, respectively. A careful reading of the statutes in question reveals that no such duty or responsibility is imposed upon the County Health Officer. Each of the statutory duties relate to disease control and prevention – not on investigating deaths having no apparent connection to communicable diseases.

## B. Prior Proceedings

The Respondents agree with the Petitioners' rendition of prior proceedings and disposition of courts below, contained at pages 5-10 of their Petition.

## REASONS FOR DENYING THE WRIT

The Petition for Writ herein should be denied because the decision of the Indiana Court of Appeals is not inconsistent with the decisions of this Court. Supreme Court Rule 10 provides for the considerations governing review on certiorari. Rule 10 states that a Petition will only be granted for a compelling reason and indicates the character or nature of the reasons this Court will consider, stating in pertinent part:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of the judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

In the case at bar, the Petitioners must bring their writ under subsection (c) of Rule 10, as they are seeking review of a judgment of a lower state court, and one on which the state court of last resort, the Indiana Supreme Court, has denied discretionary review. The Petition for Writ should be denied because the Court of Appeals' decision herein is consistent with relevant decisions of this Court and the lower court correctly and properly stated the rule of law.

## I. THE OPINION OF THE INDIANA COURT OF APPEALS HEREIN IS CONSISTENT WITH THE RELEVANT DECISIONS OF THIS COURT AND PROPERLY STATES THE APPROPRIATE RULE OF LAW.

The Petitioners began their argument by alleging that the Indiana Court of Appeals erred in applying this Court's decision in *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) to the facts in the case at bar, instead of applying this Court's holding in the case *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

Petitioners initially and improperly cite this Court to paragraph 16 of the trial court's ruling denying the second Motion for Summary Judgment as a proper characterization of their federal claims in the case at bar. Paragraph 16 of the trial court's Order denying the second Motion for Summary Judgment is contained in the Petitioner's Appendix at page 35a. Petitioners reference paragraph 16

of the trial court's Order for the proposition that *Pembaur* and not *DeShaney* apply to the facts of this case. In paragraph 16 the trial court stated:

> At issue in this case is the alleged failure of the county defendants to comply with Indiana law and administrative rules and regulations and not with the enforcement of law against third parties.

Petitioners' reliance on paragraph 16 and their citation of this Court to that paragraph is without foundation or merit as the trial court's reference in paragraph 16 is to tort claims and to the Defendants/Respondents immunity status under the Indiana Tort Claim Act and not in reference to the Petitioners' claim of civil rights violations to which the Indiana Tort Claim Act would not even apply. Further, the trial court's finding is not precedent for either the Indiana Court of Appeals or this Court.

Petitioners contend that the County and the County Health Officer herein owed an affirmative duty to the Petitioners to protect their constitutional rights from violations by Majors, the nurse at the hospital. The Indiana Court of Appeals found that the County and The County Health Officer owed no duties to the Petitioners to protect their constitutional rights, as neither the County nor the County Health Officer were responsible for the general management or control of the hospital. Absent authority to act, there can be no duty.

Vermillion County Hospital was created pursuant to the Act of 1917, and thus its governing board was created pursuant to I.C. 16-22-2-6 and 16-22-2-7. The governing board of the hospital "is the *supreme authority in the hospital and is responsible for the management, control,*

*and operation of the hospital.*" I.C. 16-22-3-1(a) (West 1997) (emphasis added). Furthermore, Indiana statutory law provides that the hospital board "may appoint and specify the privileges of the medical staff" and provides that the "medical staff is responsible to the board for the clinical and scientific work of the hospital and should advise the board of professional problems and policies." Indiana Code Annotated 16-22-3-1(d) (West 1997). The Indiana Court of Appeals found these two statutory provisions to be persuasive that the County Commissioners had no authority to direct daily operations at the hospital and thus no duty to manage or control the hospital.

The Court of Appeals rejected the trial court's findings that the County owed a duty to the Petitioners simply because the County: 1) had the authority to appoint the members of the governing board of the County hospital, pursuant to I.C. 16-22-2-6 (1993); and 2) had the authority to make a limited expansion of the governing board of the hospital pursuant to I.C. 16-22-2-7 (1993). The Court of Appeals also rejected any holding by the trial court that the County owed a duty to the Plaintiffs herein based upon Indiana statutes which provide that during certain rare events the County's participation in hospital matters is required, such as if the hospital were to cease doing business or cease to exist (I.C. 26-22-13-17(e) (1993)), or if the hospital would transfer the management to a non-profit organization. I.C. 16-22-3-18 (1993).

The Petitioners assert that " . . . without authority, the Court of Appeals of Indiana negated the statutory duties of the County Defendants cited by the trial court. . . ." Both courts were interpreting Indiana statutory codes. The determination of whether a governmental entity has final policy making authority is a question of state law. See *City*

*of St. Louis v. Praprotnik,* 485 U.S. 112 at 124-125, 108 S.Ct. 915, at 924-925. In the case at bar, the Indiana Court of Appeals reviewed the statutes and decided that the County Commissioners and the County Health Officer did not have final policy making authority over the hospital or its employee, thus deciding this issue as a matter of state law. The Indiana Supreme Court, the court of last resort, with discretionary review, has declined to grant transfer in this matter. Thus, any claims the Petitioners may have under § 1983 relating to policies and customs of the hospital are properly addressed to the hospital and its governing board and do not lie against the County or its health officer. In other words, governmental entities are only liable or responsible for its own policies, not those of another entity. See *Praprotnik*, *ibid.*, 485 U.S. 112 at 123, 108 S.Ct. 915 at 924; *Ross v. United States,* 910 F.2d 1422, 1428-1429 (7th Cir. 1990).

The duties and responsibilities of the County Health Officer are established pursuant to statute. The statutes setting forth the duties and responsibilities of the County Health Officer can be found in Title 16, Article 20, Chapter 1, of the Indiana Code:

> **16-20-1-1 Application; limited area**
>
> Sec. 1. (a) Powers and duties described in this chapter and I.C. 16-20-8 apply to all local health officers and local health boards. However, this article does not apply to a county that is subject to I.C. 16-22-8.
>
> (b) The powers and jurisdiction of a local health officer or local board are limited to the area in which the officer or board serves.

**16-20-1-9 Duties of officers and employees**

Sec. 9. The board of each local health department shall prescribe the duties of all officers and employees.

**16-20-1-10 Records; minutes**

Sec. 10. The local health officer shall keep full and permanent records of the public health work of the local health department and minutes of all meetings of the board of the local health department.

**16-20-1-11 Monthly reports; approval; permanent records**

Sec. 11. The local health officer shall make a monthly report of the work done by the local health department to the board of the local health department. After the report is approved by the board, the local health officer shall make the report a permanent record.

**16-20-1-13 Local health officer or representative; consultative meetings with state department; expenses**

Sec. 13. (a) The local health officer or a representative of all county or city boards of health shall attend meetings of the state department, when requested by the state department, for consultation concerning any matter concerning public health.

(b) The expenses of the local health officer or representative must be paid out of the health fund of the county or the city where the board of health is established, in an amount determined by the local board of health.

**16-20-1-14 Personnel; delegation of duties on agent-principal relationship; requirements**

Sec. 14. (a) Local health officer may appoint and employ public health nurses, environmental health specialists, computer programmers, clerks, other personnel, and an administrator of public health, subject to the confirmation of the local board of health, as is necessary and reasonable to carry out and perform the duties of the local health department.

(b) The employees of local health departments shall perform any of the duties of the health officer delegated by the health officer, with the approval of the local board of health, on the basis of an agent-principal relation.

(c) The public health personnel of local health departments:

(1) must meet the minimum qualification requirements of the local board of health;

(2) by local ordinance, become part of the county classification system for the respective public health personnel positions; and

(3) shall perform additional duties prescribed by the rules of the state department and local board of health under the general supervision of the local health officer.

**16-20-1-17 Vital statistics; birth and death records**

Sec. 17. (a) The local health officer shall collect, record, and report to the state department the vital statistics for the local health officer's area of jurisdiction.

(b) The local health officer shall be the registrar of births and deaths. After making a birth or death record, the local health officer shall, by the fourth day of each month, forward the original record to the state department.

**16-20-1-19 Enforcement**

Sec. 19. Local health officers shall enforce the health laws, ordinances, orders, rules, and regulations of the officer's own and superior boards of health.

**16-20-1-21 Communicable disease control; powers**

Sec. 21. Each local health board has the responsibility and authority to take any action authorized by statute or rule of the state department to control communicable diseases. The board of each local health department or a designated representative may make sanitary and health inspections to carry out this chapter and I.C. 16-20-8.

**16-20-1-22 Sanitary inspections and surveys of public buildings and institutions**

Sec. 22. Local health officers may make sanitary inspections and surveys of all public buildings and institutions.

**16-20-1-23 Inspection of private property; property in which officer has interest**

Sec. 23. (a) Except as provided in subsection (b), the local health officer or the officer's designee may enter upon and inspect private property, at proper times after due notice, in regard to the possible presence, source, and cause of disease. The local health officer or designee may order

what is reasonable and necessary for prevention and suppression of disease and in all reasonable and necessary ways protect the public health.

(b) However, a local health officer, or a person acting under the local health officer, shall not inspect property in which the local health officer has any interest, whether real, equitable, or otherwise. Any such inspection or any attempt to make such inspection is grounds for removal as provided for in this article.

(c) This section does not prevent inspection of premises in which a local health officer has an interest if the premises cannot otherwise be inspected. If the premises cannot otherwise be inspected, the county health officer shall inspect the premises personally.

**16-20-1-24 Epidemic controls; powers**

Sec. 24. (a) Local health officers may order schools and churches closed and forbid public gatherings when considered necessary to prevent and stop epidemics.

(b) An individual who takes action under this section shall comply with state laws and rules.

**16-20-1-25 Unlawful conditions; abatement order; enforcement**

Sec. 25. (a) A person shall not institute, permit, or maintain any conditions that may transmit, generate, or promote disease.

(b) A health officer, upon hearing of the existence of such unlawful conditions within the officer's jurisdiction, shall order the abatement of those conditions. The order must:

(1) be in writing if demanded;

(2) specify the conditions that may transmit disease; and

(3) name the shortest reasonable time for abatement.

(c) If a person refuses or neglects to obey an order issued under this section, the attorney representing the county of the health jurisdiction where the offense occurs shall, upon receiving the information from the health officer, institute proceedings in the courts for enforcement. An order may be enforced by injunction. If the action concerning public health is a criminal offense, a law enforcement authority with jurisdiction over the place where the offense occurred shall be notified.

**16-20-1-26 Injunctive enforcement; legal representation of health authorities**

Sec. 26. (a) A local board of health or local health officer may enforce the board's or officer's orders by an action in the circuit or superior court. In the action, the court may enforce the order by injunction.

(b) The county attorney in which a local board of health or local health officer has jurisdiction shall represent the local health board and local health officer in the action unless the county executive employs other legal counsel or the matter has been referred through law enforcement authorities to the prosecuting attorney.

**16-20-1-28 Removal of local health officers; grounds; hearing rights**

Sec. 28. (a) A local health officer may be removed only for failure to:

(1) perform the officer's statutory duties; or

(2) enforce the rules of the state department.

(b) Except as provided in I.C. 16-19-3-12, I.C. 16-19-3-13, and I.C. 16-19-3-15, a local health officer may be removed only by the board that appointed the health officer.

(c) When removal of a local health officer is sought by the appointing authority, the local health officer is entitled to the following:

(1) At least five (5) days notice.

(2) An open hearing.

(3) Representation by counsel.

I.C. 16-20-1 (West 1997).

The Court of Appeals reviewed the relevant statutes and found, as a matter of state law, that the County Health Officer is not responsible for investigating the deaths of the Petitioners' decedents.

Each of the statutory areas of authority, duties and responsibilities of the County Health Officer relates to disease control and prevention, not to investigating deaths having no apparent connection to communicable diseases. The Court of Appeals further found in footnote 9 of their opinion contained at page 20a of the Petitioners' Appendix that Dr. Albrecht's alleged knowledge of the deaths gleaned from his private medical practice cannot be

attributed to him in his role as County Health Officer. The Court of Appeals made this ruling, in part, based upon public policy. In his role as County Health Officer, Dr. Albrecht owed no duty to the Plaintiffs to investigate the high number of deaths taking place at the hospital.

The Petitioners argue that the Court of Appeals erred in that its decision is in conflict with this Court's decision in the case of *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). It is not. In the case of *Pembaur*, this court stated at pages 481-482:

> Having said this much, we hasten to emphasize that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official – even a policymaking official – has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. (Citations omitted.) *The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law.* (emphasis added)

The Indiana Court of Appeals found that a County Health Officer does not have official policymaking authority over a hospital created pursuant to the Acts of 1917 or over deaths unrelated to communicable diseases. Thus, the

County Health Officer does not possess the authority "respecting such activity" that could make the County herein liable. The Court of Appeals has decided this question, as a matter of state law, and the state court of last resort, the Indiana Supreme Court, has waived discretionary review in this matter.

It is inherent that government entities can be held liable under § 1983 *only* for acts which the entity itself is actually responsible, that is those acts which it has officially sanctioned or ordered. *City of St. Louis v. Praprotnik,* 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988), citing *Pembaur*. Also see, *Ross v. United States,* 910 F.2d 1422, 1428-1429 (7th Cir. 1990). In the case at bar, the County and the County Health Officer had no final policymaking authority over the entity or the individuals that allegedly violated the Petitioners' rights herein. Further, and perhaps more significantly, the Petitioners have failed even to articulate any such policy or custom of the County or the County Health Officer that is directly or casually linked to the alleged deprivations of civil rights. Thus, the Indiana Court of Appeals decision in this case does not in any way conflict with this Court's decision in the case of *Pembaur v. City of Cincinnati.*

Further, the Petitioners' argument that the *DeShaney* case is inapplicable to the case at bar is also without merit. The *DeShaney* case, of course, holds that a governmental entity's failure to protect an individual against private violence does not constitute a violation of the due process clause. The Plaintiffs argue that *DeShaney* is inapplicable to the case at bar because the alleged murders at the hospital were committed by an employee of the Vermillion County Hospital and because Dr. Albrecht was an employee of the County, as the County Health Officer.

Both of these arguments simply miss the mark. Majors was not an employee of the County. He was an employee of the Vermillion County Hospital. As previously noted, the board of trustees of the Vermillion County Hospital had full discretion, authority, and responsibility, for the operation of the hospital and for the staff. As to Dr. Albrecht, he simply did not cause the alleged violations of Petitioners' constitutional rights, either directly, or indirectly by his actions or inactions herein.

Petitioners herein attempted to distinguish *DeShaney* on the grounds that it involves "single acts of violence in a private setting" and on the grounds that the Petitioners were "placed" in danger by the Respondents herein. These arguments fail.

*DeShaney* does not involve a singular act of violence, but ongoing child abuse, with consistent reports to the county entity, from 1982 to 1984, resulting in "hemorrhages caused by traumatic injuries to the head inflected over a long period of time." See *DeShaney* at 193, S.Ct. 1002. The number of incidents or duration of the incidents are irrelevant to a question of whether a government entity has a duty to protect one's constitutional rights. It is simply not a determinative factor.

Petitioners next argue that *DeShaney* is distinguishable on the grounds that they were allegedly "placed" in danger. How did the County and the County Health officer place the Petitioners herein in danger? Liability for the "placement" of an individual in danger is basically limited to those situations where the individual's freedom is so restricted that the government has a duty therefore to protect their constitutional rights. See *Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982)

(case of involuntary committed mental patients); *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (duty to protect prisoners' constitutional rights.) In these cases, the duty to protect the constitutional rights arise from the limitation that the state has imposed upon the individual's freedom to act on his own behalf. In the case at bar the Respondents did not place any restrictions upon the Petitioners' freedom to act. They could have checked into the Vermillion County Hospital, or any other hospital of their choosing. They could have checked out of the Vermillion County Hospital at any point in time. The Petitioners were not "placed" in the Vermillion County Hospital by the Respondents herein. For further authorities see *Stevens v. Umsted,* 131 F.3d 697 (7th Cir. 1997) (voluntary placement of child in state run school for disabled individuals is not sufficient to create affirmative duty to protect constitutional rights) and *J.O. v. Alton Community Unit School District,* 909 F.2d 267 (7th Cir. 1990) (compulsory attendance laws requiring child to attend school is insufficient to create affirmative duty to protect constitutional rights).

Finally, the Petitioners argue that the Court of Appeals opinion is contrary to this Court's opinion in the case of *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). This argument is also without merit. As previously discussed, neither of the Respondents herein, the County nor the County Health Officer were the entity in charge of policies or customs that affected the Petitioners' constitutional rights. The Petitioners go to great lengths to attempt to establish that the County somehow has control over the Vermillion County Hospital, or its board, or Nurse Majors himself. Petitioners also go to great lengths to try and convince this

Court that the County Health Officer was somehow a policymaker over the Vermillion County Hospital, its board, or Nurse Majors himself. The Court of Appeals found that in the case at bar neither the County nor the County Health Officer were policymakers in reference to the Vermillion County Hospital or the actions of the hospital's employees. Neither the County nor the County Health Officer had a duty to protect the Petitioners' constitutional rights in the case at bar.

## II. PETITIONERS ARE NOT ENTITLED TO A WRIT OF CERTIORARI BASED ON OPINIONS FROM THE UNITED STATES COURTS OF APPEALS NOR DOES THE DECISION OF THE INDIANA COURT OF APPEALS HEREIN IN ANY WAY CONFLICT WITH THE DECISIONS OF ANY OF THE UNITED STATES COURTS OF APPEALS.

Petitioners next make the argument that the decision of the Indiana Court of Appeals herein conflicts with decisions of the United States Courts of Appeals. First of all, such an argument is not an appropriate consideration under Supreme Court Rule 10. Further, even if one considered that there are inconsistent opinions existing out there, as Supreme Court Rule 10 provides, a petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Petitioners first assert that the case at bar is in conflict with that of *Stoneking v. Bradford Area School District,* 822 F.2d 720 (3rd Cir. 1989). It is not. In the *Stoneking* decision, the alleged perpetrator of the constitutional violations was in fact an employee of the entity being sued. While respondeat superior liability could not

apply in the § 1983 claim, the school was alleged to have had actual knowledge of the ongoing violations and was alleged to have taken no actions. The court therein stated at page 724:

> Unlike DeShaney's father, who was referred to throughout the *DeShaney* opinion as a private third party, Wright was a school district employee *subject to defendants' immediate control.* In fact, many of Wright's interactions with Stoneking occurred in the course of his performance of his official responsibilities, such as during school-sponsored events and trips, and sometimes on school property.

The facts of *Stoneking* are inopposite to the facts in the case at bar. In the case at bar, Nurse Majors was not an employee of the County. This would be like the plaintiff in the *Stoneking* case suing Bradford County, rather than the Bradford Area School District. Further, it is distinguishable on the grounds that there are no allegations that the County or the County Health Officer had actual knowledge of Majors' alleged violation of the Petitioners' constitutional rights herein. Contrary to Petitioners' assertion, the *Stoneking* case is simply inapplicable to the case at bar.

Plaintiffs next assert that an exception to the *DeShaney* opinion of "state created danger" is applicable in this case, citing the Court to *Stevens v. Umsted*, 131 F.3d 697 (7th Cir. 1997). The "state created danger" exception to *DeShaney* is not applicable to this case either. In the *Stevens v. Umsted* case, the Court stated at page 705:

> In order to maintain a theory under the state created danger exception, a plaintiff must plead facts showing some *affirmative act* on the part of

> the state that either created a danger to the plaintiff or rendered him more vulnerable to an existing danger. In order for the state created danger theory to be available, the 'state [must] *affirmatively* place [] a particular individual in a position of danger the individual would not otherwise have faced.'

As previously outlined above, neither the County nor the County Health Officer "placed" the Petitioners' decedents in danger. Nor did they take any "affirmative act" that created the danger or rendered the Petitioners' decedents herein more vulnerable to an existing danger. All of the Petitioners' allegations against the Respondents speak of "failures to investigate", and failure to act. In the *Stevens* case, the Court ultimately held at page 705:

> [i]n action by the state in the face of a known danger is not enough to trigger the obligation [to protect private citizens from each other] *Reed* 986 F.2d at 1125. Stevens's complaint is phrased entirely in terms of Umsted's failure to act, and thus, does not allege an affirmative act by the state. Just as in *DeShaney*, '[t]he most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.' (Citations omitted).

Thus, the *Stevens v. Umsted* case, rather than conflicting with the case at bar, is in fact consistent with the ruling of the Court of Appeals in this matter.

The case of *Horton v. Flenory,* 889 F.2d 454 (3rd Cir. 1989) is distinguishable on its face. In that case, the Court found that a governmental entity had an official policy of deferring to private individuals a governmental function. The Court therein found that the governmental entity

could be liable for constitutional violations that may have occurred during the execution of the governmental function. That is simply not the situation in the case at bar. The Petitioners herein are attempting to blur the line between the Vermillion County Hospital, its board, the Vermillion County Commissioners and the County Health Officer.

Further, neither *Milo v. Cushing Municipal Hospital*, 861 F.2d 1194 (10th Cir. 1988) nor *Malak v. Associated Physicians, Inc.*, 784 F.2d 277 (7th Cir. 1986) are applicable to the case at bar. Both those cases involve the actions by a private person or a private entity which might constitute actions of the state under the color of state law, i.e., when the state contracts with a private entity to fulfill a governmental function. This is not a case where the County or the County Health Officer has attempted to insulate themselves from liability by transferring policy-making authority to some type of private entity. See *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988) (*Praprotnik* opinion) at 127; and at 926.

Finally, Petitioners begin to digress into arguments regarding assertions of the various constitutional rights that were violated. In response, the Respondents would simply cite the Petitioners in this Court to the Seventh Circuit in the case of *J.O. v. Alton*, at page 273 wherein the Court stated:

> What the plaintiffs need to show is not an expansive list of liberties allegedly taken from them but some action by the defendants that would justify the imposition of liability. The plaintiffs have failed to make this showing no matter how

> their rights are characterized, and for this reason their claims must fail.

This language is applicable to the case at bar, no matter how Petitioners frame their alleged constitutional rights – as life, liberty or family association – they cannot show any action on the part of the Respondents herein that would justify the imposition of liability in this case. Therefore, the Court of Appeals was correct in its ruling in this matter. Said ruling is consistent with the opinions of this Court and, therefore, the Petition for Writ of Certiorari should be denied.

## CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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